FILED
OCT 25 2006
OFFICE OF THE CLERK

06-762

In The Supreme Court of the United States

ESTATE OF TARIK K. RODGERS, by and through his administrators MICHAEL RODGERS and BRENDA RODGERS, and BRENDA RODGERS and MICHAEL RODGERS, as Parents of the Decedent,
Petitioners,

v.

STEVE SMITH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gary S. Parsons
Counsel of Record
Gavin B. Parsons
D. Martin Warf
TROUTMAN SANDERS LLP
Post Office Box 1351
Raleigh, North Carolina 27602-1351
(919) 212-4110

James R. Morgan, Jr.
Counsel of Record
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
One West Fourth Street
Winston-Salem, North Carolina 27101
(336) 721-3710

Counsel for Respondents

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

REASONS THE COURT SHOULD DENY THE WRIT 7

Standard of Review 7

Farrow Did Not Seize Rodgers 8

District Court Properly Granted Qualified Immunity To Waters Regarding Release of the Police Canine 11

District Court Properly Granted Qualified Immunity To Defendant Officers Regarding Use of Force and Remaining Defendants on Derivative Liability 13

District Court Properly Granted Summary Judgment on Petitioners' State Law Claims 16

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Bella v. Chamberlain,
24 F.3d 1251 (10th Cir. 1994) 10

Brower v. County of Inyo,
817 F.2d 540 (9th Cir. 1987), *rev'd*,
489 U.S. 593 (1989) 8, 9

Carr v. Tatangelo,
156 F. Supp. 2d 1369 (M.D. Ga. 2001) 10

Cole v. Bone,
993 F.2d 1328 (8th Cir. 1993) 10

Elliott v. Leavitt
99 F.3d 640 (4th Cir. 1996) 13, 14

Haring v. Prosise,
462 U.S. 360, 103 S. Ct. 2368 (1983) 16

Jamison v. Shaw,
772 F.2d 1205 (5th Cir. 1985) 9

Kopf v. Wing,
932 F.2d 265 (4th Cir. 1991) 12

Leavitt v. Jane L.,
518 U.S. 137, 116 S. Ct. 2068 (1996) 16

Parris v. Town of Alexander City,
45 F. Supp. 2d 1295 (M.D. Ala. 1999).....10

Priester v. City of Riviera Beach,
208 F.3d 919 (11th Cir. 2000).....11, 12

Vathekan v. Prince George's County,
154 F.3d 173 (4th Cir. 1998).....12

Constitutional Provision

U.S. CONST. amend. IV 9, 10, 11

Rule

U. S. Sup. Ct. R. 10 .....8, 9

STATEMENT OF FACTS

The following facts are pertinent to this Court's determination of the Petition and were carefully not mentioned by Plaintiffs in their Petition. On April 11, 2002, Angela Freeman obtained a restraining order against Tarik Rodgers, the father of her children. (SJA at 24; JA at 113)[1]. During the three years preceding the restraining order, Rodgers had physically abused Ms. Freeman several times. (JA at 172-73, 88). Prior to the entry of the restraining order, Rodgers and Ms. Freeman had a fight in which Rodgers told Ms. Freeman that "if he couldn't have her, no one would" and threatened to "get her." (JA at 89, 100). Rodgers – who weighed around 250 pounds – subsequently proceeded to try to run her off the road, got her in a chokehold around her neck, accused her of having a relationship with another man, and then headbutted and kicked her in the stomach after knocking her onto the ground. (JA at 89-90, 170-71, 173, 185).

On the evening of April 14, 2002, at approximately 9:30 p.m., Rodgers was served with a domestic violence protective order obtained by Ms. Freeman. (JA at 90, 173-174). Within a half hour, Rodgers entered Ms. Freeman's home with a gun in his hand. *See id.* In front of their two children, Rodgers pushed the barrel of his gun (a Ruger pistol) into the left side of Ms. Freeman's neck, told

---

[1] References to JA are to the Joint Appendix on file with the Fourth Circuit Court of Appeals. References to SJA are to the Supplemental Joint Appendix on file with the Fourth Circuit Court of Appeals.

Freeman's cousin not to call the police, and took Ms. Freeman out the back door at gunpoint, to his car. *See id.*

Rodgers drove down a dirt road and told Ms. Freeman that he planned to "off her and then off himself." (JA at 91, 174-176). As they sat in the car, Rodgers repeatedly shoved the gun in her face and into her ribs. *See id.* He then asked Ms. Freeman to perform oral sex on him. *See id.* Rodgers then had sexual intercourse with Ms. Freeman. *See id.* Afterward, Rodgers began driving the car again and asked Ms. Freeman if she would shoot him if he gave her his gun, and Ms. Freeman said no. (JA 92, 176-179). Rodgers then said he ought to pull up to the police and provoke them. *See id.*

They passed a Sheriff's Department vehicle, and Rodgers began accelerating to speeds of approximately 110 miler per hour. (JA at 93, 179-184). Rodgers drove into the downtown area of Williamston and, following a lengthy pursuit by law enforcement officers, slammed on his brakes and slid off the street into in a carwash parking lot, at which point his vehicle came to a stop. *See id.* Rodgers then looked at Ms. Freeman and said "This is it." *See id.*

Shortly after the kidnapping that evening, the Williamston Police Department received a call reporting that Ms. Freeman had been kidnapped at gunpoint from her home. (JA at 128). Law enforcement officers responding to the call were informed that Rodgers was armed and dangerous, and this information was broadcast over the police

radio. (JA at 129-130). Officer Waters and the other William[illegible] Defendants were aware that the Williams[illegible] Police Department had received a call that Angela Freeman had been kidnapped at gunpoint from her home by her boyfriend Tarik Rodgers some time after 9:30 p.m. April 14, 2002. (JA 133-134 ¶¶ 3-5). They were told that prior to kidnapping Ms. Freeman, Rodgers had been served with a domestic violence protective order and became upset because he thought he could not see his children anymore. (JA 134 ¶ 6). One of the witnesses to the kidnapping informed the Williamston Defendants that Rodgers was armed with a Ruger-type handgun, possibly a nine millimeter pistol; that Rodgers had threatened the occupants of Ms. Freeman's home; that Rodgers stated he was not going down without a fight, and that Rodgers threatened the witness, telling her not to call the police or he would kill Ms. Freeman and then return to the home to kill the witness. (JA 129 ¶¶ 5-10). A radio broadcast was also made to the Williamston Defendants informing them to be on the lookout for Rodgers because he was considered armed and dangerous. (JA 130 ¶ 12).

Waters and the Williamston Defendants were informed that Martin County Sheriff's Deputies had attempted to stop Rodgers' car, but he refused to stop and led them on a high-speed chase through Martin County, all the while holding Ms. Freeman captive in his car. (JA 134 ¶ 7). Williamston Officers Waters, Brown, Forney, and Cox became involved in the vehicular pursuit of Rodgers on the evening of April 14, 2002 and early morning April 15, 2002, and Rodgers continually refused to stop for numerous

law enforcement officers with their blue lights engaged. (JA 134 ¶ 8; JA 139 ¶¶ 7-8; JA 130 ¶ 13).

Along with various officers from the Williamston Police Department, Deputies Walter Farrow, Scott McFarlane, and David Cross of the Martin County Sheriff's Department joined in the pursuit of Rodgers' vehicle. (SJA at 25, 34, 38-39). After Rodgers' vehicle came to a stop, Farrow parked his car in the car wash parking lot near Rodgers' vehicle. (SJA 39). He saw Williamston Police Officers Charlie Brown and William Waters run towards the driver's side of Rodgers' vehicle and yell to Rodgers "Get out of the car, get out of the car!" *See id.*

After Rodgers ignored repeated verbal commands to get out of the vehicle, Brown opened the driver's side of Rodgers' car and repeated these commands, which Rodgers continued to ignore. (JA at 139). Brown then reached into the vehicle, grabbed Rodgers by the shirt, and attempted to pull him out of the vehicle. Rodgers resisted these efforts, pulling himself back into his vehicle, reaching toward the center console area with his right hand, and grabbing a handgun. (JA at 140). Brown yelled "Gun!" and retreated toward the rear of Rodgers' vehicle. *See id.*

Officer Waters heard someone shout "gun" as officers attempted to get Rodgers out of his vehicle. (JA 134 ¶ 11). Officer Waters, along with the other Williamston Defendants present at the scene just after Rodgers exited his vehicle were closest to Rodgers. (JA 134 ¶¶ 12-13; JA 140 ¶¶ 15-16, 19; JA

145 ¶13). All these officers saw Rodgers outside his vehicle brandishing a pistol. *See id.* Upon observing Rodgers outside his vehicle waving a handgun in a threatening manner, these Williamston Defendants felt in fear for their own lives, and thought Rodgers was a danger to everyone present at the scene. (JA 135 ¶¶ 14-16; JA 140 ¶¶ 20-21; JA 145-146 ¶¶ 14-15). After Rodgers got out of the car, he advanced toward Waters with his gun pointed toward Waters. (JA at 134-35; SJA at 39). Waters released a police canine in an effort to protect himself from Rodgers, but Rodgers was able to resist the canine and continued to point his gun at Waters. (JA at 135, 140).

Farrow heard Brown yell "Gun!" and then saw Brown running backwards. (SJA at 39). Farrow yelled at Rodgers: "Put the gun down. Get down!" Rodgers ignored these commands. *See id.* Farrow heard Waters fire several shots at Rodgers, but Rodgers remained standing with his gun pointed toward the officers. (SJA at 39; JA at 135).

Farrow then saw Rodgers turn and point the gun toward Farrow. (SJA at 39). Rodgers was very close to Farrow at that time. *See id.* Farrow then fired his weapon (a Beretta .40 caliber pistol) in Rodgers' direction because he feared for his life and believed that Rodgers intended to shoot him. *See id.* Rodgers did not appear to be fazed and remained standing. *See id.* Waters then fired several more shots at Rodgers which struck him. *See id.* Only then - for the first time – did Rodgers fall to the ground. (SJA at 39; JA at 135). When he hit the ground, Rodgers' handgun fell out of his right hand

and landed a short distance from his body. (DVD)[2]. After the shooting, Martin County Deputy Sheriff Walter Farrow recovered Rodgers' pistol from where it had fallen on the ground and placed it on the hood of his patrol car. (JA 146 ¶ 17-18; DVD).

These critical facts were completely ignored by the Petitioners. The majority agreed that Rodgers held a firearm when he engaged the law enforcement officers at the scene. (Pet.App. 14). Although the dissent disagreed with certain facts and the majority's holding, it agreed that, "...it is undisputed that Rodgers eventually drew a gun..." (Pet.App. 23)(emphasis added).

Another key fact Plaintiffs omit was that the District Court's January 15, 2004 order setting limitations on discovery was a consent order agreed to by counsel for Plaintiffs, and it did not stay all discovery of the Martin County Defendants and Williamston Defendants. Rather, it merely limited discovery to issues related to qualified immunity. Plaintiffs also misstate the District Court's opinion in their Statement of the Case, saying "having divested itself of pendant jurisdiction, the court dismissed all of the remaining state law claims." To the contrary, the District Court dismissed the state law claims on their merits. (JA 497-500, 512).

---

[2] Reference to the DVD is to a video that was filed with the Fourth Circuit Court of Appeals and authenticated by affidavits in the Joint Appendix.

REASONS THE COURT SHOULD DENY THE WRIT

Standard of Review

As the Court is no doubt well aware:

Review of a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision of a state court of last resort; or has so far departed from accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this

> Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

United States Supreme Court, Rule 10 (emphasis added).

This case was carefully reviewed by the United States Court of Appeals for the Fourth Circuit, and a reasoned application of well-stated rules of law yielded a decision against Petitioners they now claim is "inconsistent" and "short-sighted." Other than mischaracterizing the record, however, Petitioners identify no areas in which the Fourth Circuit's decision conflicts with those of other circuits or diverges from proper judicial review.

Farrow Did Not Seize Rodgers

Petitioners first suggest that the District Court and later the Fourth Circuit erred by granting and affirming summary judgment for the Respondents by holding that Rodgers was not seized by Deputy Farrow who fired at Rodgers but whose bullets never struck him. Petitioners fail to point to any case law that meets the standard of review for this Court to grant their Petition. Petitioners presumptively cite this Court's opinion in *Brower v. County of Inyo*, 489 U.S. 593 (1989), as support for

their assertion that *Rodgers* "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power[.]" United States Supreme Court, Rule 10. However this is completely misplaced.

Brower is an apt example of a circuit split warranting Supreme Court intervention. In that case, the Ninth Circuit had held that the method by which police officers used a roadblock did not effect a seizure under the Fourth Amendment and a claimant's complaint therefore failed to state a claim for relief. *See Brower v. County of Inyo*, 817 F.2d 540 (9th Cir. 1987), *rev'd*, 489 U.S. 593 (1989).

The exact opposite conclusion was reached in *Jamison v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), an opinion by the Fifth Circuit two years earlier, that determined that a claimant who contested the method by which police officers had used a roadblock did state a claim for which relief could be granted. The facts of both cases were by all material counts identical—in both cases a decedent was killed by making contact with a police roadblock set up in the dark, in an area of a road where visibility was limited and police "blinded" the driver with their lights moments before the crash—but the legal analysis of each court was wholly divergent.

Thus, in that scenario, if presented with the identical facts, the Ninth Circuit would not allow a constitutional cause of action against the police officers and the Fifth Circuit would, both doing so as a matter of law. That is quintessentially the judicial

conflict that a writ of certiorari was designed to address—and did.

Petitioners here have failed to reference any case indistinguishable on its facts that is legally divergent from the District Court and Circuit Court's analysis. That glaring absence is strong evidence that this Court's review is unnecessary.

In addition, courts from other jurisdictions have repeatedly rejected the Petitioners' argument that it is "irrelevant" whether an officer's shots actually strike the subject in determining whether a seizure has occurred. *See Bella v. Chamberlain*, 24 F.3d 1251, 1255-56 (10th Cir. 1994) (shots fired by officer that struck victim's helicopter did not result in seizure under Fourth Amendment because, while constituting an assertion of authority, the shots did not cause the victim to submit to authority or succeed in stopping him); *Cole v. Bone*, 993 F.2d 1328, 1332-33 (8th Cir. 1993) (shots fired at suspect's truck that did not hit him were not seizures because they failed to produce a stop); *Carr v. Tatangelo*, 156 F. Supp. 2d 1369, 1377 (M.D. Ga. 2001) ("[S]hooting at a person does not constitute a seizure within the meaning of the Fourth Amendment unless the person is actually shot (i.e. is physically touched) or is stopped in what he is doing (i.e. submits to the show of authority)"; *Parris v. Town of Alexander City*, 45 F. Supp. 2d 1295, 1302 (M.D. Ala. 1999) (shooting at suspect is not seizure unless person is actually shot or shot causes fleeing person to submit to officer's show of authority). The District Court and the Fourth Circuit were not in conflict with other federal courts, and did not depart from the

accepted and usual course of judicial proceedings; and therefore, Petitioners' claims regarding Fourth Amendment seizure do not merit consideration by this Court.

District Court Properly Granted Qualified Immunity To Waters Regarding Release of the Police Canine

In an apparent attempt to show at least one other circuit court in conflict with the Fourth Circuit's decision here regarding the lower courts' grant of qualified immunity to Officers Waters and/or other Williamston Respondents regarding the release of Waters' police canine, Petitioners cite *Priester v. City of Riviera Beach*, 208 F.3d 919, 926-27 (11th Cir. 2000), in the last sentence of their petition. This case falls dramatically short of establishing a conflict with other courts required for this Court's review. Instead *Priester* is completely consistent with *Rodgers*. The two read together are clear examples of how the same reasonable and objective analysis of law regarding excessive force under the Fourth Amendment can, on application of the law to different facts, produce two distinct but congruent outcomes.

In *Priester*, the Eleventh Circuit affirmed the district court's denial of a defendant police officer's motion for judgment notwithstanding the verdict based on the officers' qualified immunity. There, the officers allowed a police canine to attack for two minutes an unarmed, cooperative, potential suspect—identified just on tracking a scent for

twenty minutes—in a $20.00 robbery of snacks. *Priester*, 208 F.3d at 927. A quick review of the facts of this case quickly dispels any purported conflict.

In this case Rodgers kidnapped his former girlfriend at gunpoint in front of his two children, incited a high-speed chase by refusing to stop for law enforcement officers, brandished a weapon at law enforcement officers upon exiting his car, refused to surrender to a police canine, and continued to point a handgun at officers during an altercation with a police canine. (Pet.App 4-8). Unlike the claimant in *Priester*, Rodgers was captured on videotape armed with a handgun which was recovered, again on camera following the shooting. (Pet.App 14-16)(DVD).

The *Priester* court was not presented with an armed claimant who posed a threat to the lives of the law enforcement officers and others. This is precisely why the Fourth Circuit distinguished the present case from both *Kopf v. Wing*, 932 F.2d 265 (4th Cir. 1991) and *Vathekan v. Prince George's County*, 154 F.3d 173 (4th Cir. 1998). Here, Officer Waters faced a man he had been informed was armed both by radio during the chase and by Officer Brown who shouted "Gun!" There is little doubt that if each circuit were presented with the facts of the other, their decisions would be in accord. Both *Rodgers* and *Priester* followed the same method of analysis and processed each set of facts through same rules of law. Differing outcomes in this scenario are precisely what justice requires and why *Rodgers* merits no further review.

District Court Properly Granted Qualified Immunity To Defendant Officers Regarding Use of Force and Remaining Defendants on Derivative Liability

Petitioners fail to cite any authority to support their contention that summary judgment for Defendants on Plaintiffs' use of force claims was improper under Fourth Circuit caselaw or under any other federal appellate decisions. The Fourth Circuit followed a legally and factually analogous published opinion in *Elliott v. Leavitt* 99 F.3d 640 (4th Cir. 1996). The Fourth Circuit in *Elliott* explained its ruling thusly:

> We reverse the judgment of the district court, finding that the officers' use of deadly force in response to an obvious, serious, and immediate threat to their safety was reasonable under *Graham v. Connor*...The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.

Elliott, 99 F.3d at 641 (emphasis added). The Court further explained that:

> [T]he critical point...is precisely that [the suspect] was threatening the lives of [the officers]. The Fourth Amendment does not require police officers to wait until a suspect shoots to

> confirm that a serious threat of harm exists.
>
> No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat to his or her life. As *Greenidge* and *Slattery* illustrate, the Fourth Circuit does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect's intent to cause them harm—the Constitution does not require that certitude precede the act of self protection.

Id. 99 F.3d at 643-644 (emphasis added).

As the *Rodgers* Court noted,

> [T]he uncontradicted record evidence establishes that at some point after initially emerging from the car, Rodgers acquired his firearm, either by reaching back into the car and grabbing it (as Officer Brown's testimony would indicate), or by some other means (such as removing it from the waistband of his pants, an inference consistent with Freeman's testimony). Further the

> uncontradicted record evidence indicates that Officer Brown shouted "Gun!" and, critically, that Rodgers waved the weapon around and pointed it direct at Officer Waters and Deputy Farrow. Indeed, Officer Waters testified that he saw Rodgers point the firearm at him after Rodgers had been engaged by the police dog. When Officer Waters was presented with these circumstances, he also knew that Rodgers had abducted his estranged girlfriend at gunpoint, had led officers on a lengthy high-speed chase, and had caused one of the pursuing vehicles to crash into his own. We therefore hold that Officer Waters' use of deadly force was not objectively unreasonable in light of the circumstances know to him at the time of the shooting.

(Pet.App. 14-15).

Rather than argue a misapplication of the law, Petitioners continue to reargue their version of the facts of the case without the support of any published opinions. This attempt for another bite at the proverbial apple should therefore fail, because it does not comport with the applicable standard of review.

District Court Properly Granted Summary Judgment on Petitioners' State Law Claims

Petitioners also argue without support from any published authority that the dismissal of their state law claims was improper. Because those claims are not generally reviewable by this Court absent clear error, and Petitioners have demonstrated none, these claims do not merit discussion. *Haring v. Prosise*, 462 U.S. 360, 314, n.8, 103 S.Ct. 2368 (1983); *Leavitt v. Jane L.*, 518 U.S. 137, 144-145; 116 S.Ct. 2068 (1996).

CONCLUSION

Petitioners have failed to meet the standard of review to justify taking this Court's time and resources to reconsider Petitioners' claims. They cannot arguably show any way in which the Fourth Circuit's opinion conflicts with other federal Circuits or exceeded the bounds of the accepted and usual course of judicial proceedings. Petitioners' claims do not merit additional review.

This the 25 day of October, 2005.

/s/ Gary S. Parsons
Gary S. Parsons
N.C. State Bar No. 7955
Gavin B. Parsons
N.C. State Bar No. 28013
D. Martin Warf
N.C. State Bar No. 32982
TROUTMAN SANDERS LLP
Post Office Box 1351
Raleigh, NC 27602-1351
Telephone No. (919) 212-4110

Attorneys for the Williamston Respondents

/s/ James R. Morgan, Jr.
James R. Morgan, Jr.
N.C. State Bar No. 12496
Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company
One West Fourth Street
Winston-Salem, NC 27101
Telephone No. (336) 721-3710

Attorney for the Martin County Respondents